

MOTION FILED

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No. 93-518

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In The
Supreme Court of the United States
October Term, 1993

FLORENCE DOLAN,

Petitioner,

v.

CITY OF TIGARD,

Respondent.

On Petition For Writ Of Certiorari
To The United States Supreme Court

MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND AMICUS CURIAE BRIEF OF
NORTHWEST LEGAL FOUNDATION IN SUPPORT
OF THE PETITION FOR CERTIORARI

JEANETTE R. BURRAGE
Northwest Legal Foundation
557 Roy Street, Suite 100
Seattle, Washington 98109-4219
(206) 283-0503

Attorney for Amicus Curiae

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF OF NORTHWEST LEGAL FOUNDATION IN
SUPPORT OF PETITION FOR CERTIORARI**

This motion of Northwest Legal Foundation (NLF) for leave to file the annexed amicus curiae brief is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the Clerk of this Court. Consent has been withheld by counsel for the City of Tigard.

NLF is a non-profit, public interest law firm. NLF is dedicated to protect the rights of private landowners against excessive land use regulations being imposed at all levels of government. It is actively involved in drafting legislation, education, research and litigation. Our efforts are supported almost entirely by voluntary contributions.

NLF is motivated by the firm belief that private landowners should not bear burdens that in all fairness and justice should be borne by the public, a concept reiterated by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987). NLF also holds the strong conviction that protection of private property is pivotal in our free market system. Moreover, NLF agrees with Justice Stewart that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In this proceeding, NLF seeks to augment the argument in the petition for certiorari by highlighting 1) the

adverse impacts on landowners in Oregon and nationwide which could be triggered by the Oregon decision, and 2) the need to clarify and strengthen constitutional protection of private property. NLF believes that the decision of the Oregon Supreme Court is incorrect and poses a serious threat to property rights.

For the foregoing reasons, the Northwest Legal Foundation requests that this motion for leave to file the annexed amicus curiae brief be granted.

DATED: October 29, 1993

Respectfully submitted,

JEANETTE R. BURRAGE
Northwest Legal Foundation
557 Roy Street, Suite 100
Seattle, WA 98109-4219
Telephone: (206) 283-0503

Attorney for Amicus Curiae

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I.

STATEMENT OF INTEREST

The Northwest Legal Foundation is a nonprofit, public interest law firm, which focuses on litigation concerning civil rights associated with ownership and use of private property, and is supported by approximately 600 members, primarily in Washington State. The decision below implicates fundamental rights of property owners.

II.

SUMMARY OF ARGUMENT

The decision below substantially undermines protection for private property owners established under the Fifth Amendment. The Oregon Supreme Court upheld a decision by Oregon's Land Use Board of Appeals ("LUBA") requiring a landowner seeking to replace the existing building in which it conducts its electric and plumbing supply business with a larger structure, to dedicate 7,000 square feet, approximately the same amount as the new building's additional square footage will be, to public purposes (i.e. future storm drainage and a bicycle pathway). Relying upon LUBA findings that it was "reasonable to assume" that customers "could" use the bicycle path (the idea of customers returning to their construction project carrying plumbing fixtures by bicycle is indeed captivating) and "could" offset some of the traffic demands on streets. From these assumptions about possibilities the City of Tigard Land Conservation and Development Commission (LCDC) concluded that the

requirements imposed upon landowners were "reasonably related" to the development.

The decision below applies the wrong test, and misapplies the test at that. As this Court held in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) in order to avoid activating the Takings Clause of the Fifth Amendment to the U.S. Constitution, an exaction by a government agency must have an "essential nexus" with the contemplated development. Even if a mere "reasonable relationship" were sufficient to meet constitutional requirements, the Oregon Supreme Court vitiates even that standard by concluding that the relationship may be established by speculation and assumption rather than persuasive evidence.

III. ARGUMENT

A. The Importance and Clarity of This Case Justifies Review.

This case is especially appropriate for Supreme Court review because the factual record imposes no obligation to evaluate the sufficiency of the evidence. The Court need not go beyond the findings themselves to determine the speculative and conditional nature of the "reasonable relationship" finding. More artful findings could mask what a local agency is doing and muddle the consideration of the constitutional claim. The candor with which LCDC extracted its requirements presents this case to the court in an unequivocal legal form.

The decision below substantially undermines protection for private property owners established under the Fifth Amendment. Left unreversed, the decision may encourage similar unconstitutional takings not only in Oregon but elsewhere and may transform the "essential nexus" test to a "speculative possibility" test.

Further, the extent to which LCDC was willing to go illustrates the challenge to private property throughout the nation. The precedent set by LCDC is likely to be gratefully used by other government agencies to justify their takings.

B. The Decision Below Conflicts With the Fifth Amendment Principles Stated By This Court.

1. The Decision Fails to Apply the "Essential Nexus" Test.

In the past decade, in response to the increased efforts by local government agencies to acquire the use of private property for public purposes without compensation, this court has clarified the relationship which must exist before the government can avoid its obligation to pay for private property under the Takings Clause.

Clearly the City of Tigard has determined that a public bicycle pathway across the Dolan property is desirable. It could, if it wished, obtain title to or an easement across the land by condemnation, paying the landowner a just compensation.

Instead of condemning the pathway, however, the City sought to obtain it for nothing through a city ordinance which *required* dedication of a pedestrian/bicycle

path for *any* development along the designated pathway. (City Code Section 18.86.040(b)).

No relationship whatsoever is required under the City Code between the development and the requirement for the bike path. *Any* request for a development must be conditioned upon dedication and construction of the bike path if, but only if, the property lies on a designated path. Thus, under the ordinance even a development which could be shown to reduce traffic would be subject to the condition. Conversely, a development identical to the Dolan building located across the street, although it would entail an identical impact, would not be conditioned with the dedication of a bike path (because the project would not take place on the designated pathway).

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the court addressed the requirement that there be an "essential nexus" between the condition required by the government and the legitimate purpose served by the regulation. There, the nexus was absent when the right to reconstruct a house on beach front property was conditioned upon the granting of a public easement across the privately owned beach. The "lack of nexus" converted the building restriction from a legitimate exercise of the police power to a taking. As the court said:

[U]nless the permit condition serves the same governmental purpose as the developmental ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

483 U.S. at 837 (quoting from *J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981)).

There is no "essential nexus" between construction of a bicycle path and enlargement of a plumbing supply business where the dedication of the pathway does not turn on specific substantial impact of the development.

2. Even Under a "Reasonable Relationship" Test, the City of Tigard Conditions Do Not Meet Constitutional Standards.

The Oregon Supreme Court rejected the "essential nexus" test asserting that a lower standard, the "reasonable relationship" test applies. But as the findings of LCDC make clear, the conditions were imposed not because there was a "reasonable relationship" between the larger building and the public use of a bike path, but because there was a speculative, potential relationship.

As the dissenting opinion below stated:

In essence, the only factual findings that support the pedestrian/bicycle pathway exaction are these: A larger commercial building is to be constructed and, as a result, there is anticipated to be "additional vehicular traffic." That is not enough to support what amounts to a virtual taking of petitioner's land. I would require findings that *demonstrate* that the increased intensity of use requires the exaction. These findings do not establish that the pathway exaction is needed because of any higher intensity of use.

317 Or. 110, 127 (emphasis in original).

If the decision below is not reviewed, it will remain as authority for the proposition that a "reasonable relationship" may be established without any evidentiary findings related to the actual impact of proposed project.

IV.

CONCLUSION

If this Court does not review or correct the decision below, other states will be encouraged to embark on similar regulatory schemes under the mistaken belief that the Fifth Amendment does not apply, unless total use is denied. Takings in the guise of regulation will continue to stifle individual rights.

DATED: October 29, 1993

Respectfully submitted,

JEANETTE R. BURRAGE
Northwest Legal Foundation
557 Roy Street, Suite 100
Seattle, WA 98109-4219
Telephone: (206) 283-0503

Attorney for Amicus Curiae